IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 136

INDIAN-DAY LUMBER COMPANY,

Petitioner,

vs.

SYDNEY C. McLOUTH,

Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,

Respondent.

PETITIONER'S BRIEF.

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Official reports of opinions delivered in court below.

District Court Opinion, 6 Fed. (2d) 471.

Circuit Court of Appeals, 13 Fed. (2d) 581.

STATEMENT OF JURISDICTION OF SUPREME COURT.

(1) This is an action of assumpsit commenced by the Ingram-Day Lumber Company, a Wisconsin corporation, in the District Court of the Unted States for the Eastern District of Michigan, Southern Division, against Sydney C. McLouth, a citizen and resident of Marine City, Michigan, for the recovery of damages for breach of contract in an amount not exceeding one hundred thousand dollars. (R. 1-4.) Judgment was entered in the District Court June 1, 1925 (R. 39). On writ of error this judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 30, 1926 (R. 73).

(2) It was contended by petitioner in the District Court and in the Court of Appeals (R. 63-65):

(a) That the admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was erroneous.

(b) That the District Court having found as a fact that petitioner had been damaged by McLouth's breach of contract in the amount of $42,789.96, erred in rendering judgment for petitioner for the sum of $647.65.

(c) That the Court erred in permitting McLouth to file an amended plea.

(d) That the Court erred in holding that the cancellation by the Fleet Corporation of its contracts

with McLouth, permitted McLouth to in turn cancel his contract with petitioner.

(e) That the Court erred in failing to find as a matter of fact that the United States Government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract between petitioner and McLouth.

(f) That the Court erred in holding that the Act of June 15, 1917, applied to this contract.

(3) Certiorari was prayed under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

U. S. Comp. Stat., Cum. Supp. 1925, *Chap.* 10, *Par.* 1217.

STATEMENT OF CASE.

Petitioner, a Wisconsin corporation, having its principal place of business at Lyman, Mississippi (R. 35), entered into a written contract on February 5, 1919, with respondent's intestate, one Sydney C. McLouth of Marine City, Michigan, wherein petitioner agreed to sell and McLouth to buy certain lumber at a definite price per thousand feet (R. 5-10). McLouth had previously contracted with the United States Shipping Board Emergency Fleet Corporation for the building of tugs (R. 51-52). The contract between McLouth and petitioner made no mention of the Fleet Corporation contracts nor did it contain any provision for cancellation (R. 5-14). The District Court found as a fact that at the time of entering into said contract

petitioner did not know that McLouth had a contract with the Fleet Corporation, or that the tugs mentioned in the instant contract were in fact being built for that corporation (R. 36, 61).

On April 29, 1919, by telegram (R. 53) the Fleet Corporation notified McLouth to suspend work on certain hulls and to "order all work stopped on commitments made * * * as to these hulls." The telegram also stated "Permission is hereby given you subject to our final approval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order." On September 17, 1919, the Fleet Corporation by letter (Ex. 10, R. 55) notified McLouth that his contracts with the Corporation "are hereby cancelled" as to certain hulls. Said letter also stated "You (McLouth) are hereby directed to notify all sub-contractors affected by this cancellation."

On May 6, 1919, McLouth's agent sent petitioner a telegram reading, "McLouth advises tug contracts cancelled. Stop further shipments pending instructions." (R. 47.) Petitioner thereupon ceased manufacturing the contracted lumber, but refused to accede to cancellation. (R. 48.)

Suit was brought by petitioner against McLouth in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover damages caused by McLouth's breach of his contract (R. 1-14). McLouth appeared by the United States District Attorney and pleaded the general issue (R. 14-15). Thereafter McLouth died and the suit was revived against respondent, his administrator, who ap-

peared by the Assistant United States District Attorney and pleaded the general issue (R. 21-22). A jury was waived (R. 23) and the case tried by the Court. Respondent was permitted over petitioner's objection to introduce his contracts with the Fleet Corporation and their subsequent cancellation (R. 51-55). The District Judge made findings of fact and law. He determined petitioner's total damages at $42,789.96, of which amount $42,142.31 represented lost profits (R. 61). This item he disallowed, relying on Todd Dry Dock and Construction Corporation vs. Sumner Iron Works, 289 Fed. 217 (certiorari denied, 263 U. S. 700) and entered judgment for $647.65 (R. 39-40). This was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit (R. 73), said court likewise relying on the Todd Case, supra, and in apparent disregard of the District Judge's findings, holding petitioner a sub-contractor (R. 78).

SPECIFICATION OF ERRORS RELIED ON.

First. Said Circuit Court of Appeals erred in affirming the judgment of the District Court.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the District Court, and in not remanding said cause to said District Court with instructions to enter judgment for petitioner in the sum of $42,789.96.

Third. Said Circuit Court of Appeals erred in affirming the rulings of the District Court permitting the introduction in evidence of McLouth's transactions with the Fleet Corporation.

Fourth. Said Circuit Court of Appeals erred in holding that petitioner was not entitled to judgment for its damages amounting to $42,789.96.

Fifth. Said Circuit Court of Appeals erred in limiting petitioner's recovery to the sum of $647.65.

Sixth. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, conferred the power to modify the obligations of a private contract.

Seventh. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, applied to this case.

Eighth. Said Circuit Court of Appeals erred in holding that petitioner was a sub-contractor.

Ninth. Said Circuit Court of Appeals erred in holding that the law permitted no recovery of lost profits.

Tenth. Said Circuit Court of Appeals erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth conferred upon McLouth the power to cancel his contract with petitioner.

SUMMARY.

Petitioner contends:

1. That the contract in question was a private contract, to which the United States is not a party and in which it is not interested.

2. That the contract, having been entered into nearly three months after the Armistice and the conclusion of the war, is to be construed in a just, reasonable and usual manner as such private contract and that resort is not to be had to inference, innuendo, or conjecture, to deprive petitioner of its rights under said contract.

3. The doctrine of Frustration contended for by respondent is not applicable to the instant facts.

4. That the Act of June 15, 1917 (40 Stat. 182) has no application to the case at bar because

(a) It was not as a fact invoked, and

(b) The instant contract was not a sub-contract.

BRIEF OF ARGUMENT.

I. The United States Not a Party.

Under the constitution and judicial code petitioner, because of diversity of citizenship, had a right to sue McLouth in the United States Court. This is a suit between a corporation and an individual. There is no provision of law whereby the United States Government may substitute itself as respondent, nor prevent the law taking its course as to the respondent, and it is submitted that the United States District Attorney is not acting in his official capacity. It is the certain right of petitioner to have his case considered by this Court free from the inference that the presence of the District Attorney naturally presents.

II. Contract Entered Into After the Armistice.

The contract in question was entered into on February 5, 1919, nearly three months after the conclusion of the World War. It was for a commodity, lumber, in general use in shipbuilding and in trade in industry. It breathed not a word with reference to the Fleet Corporation contracts and as found by the District Judge (R. 36) petitioner knew nothing of said contracts. The contract had no provision for cancellation. Had the general price of lumber advanced rather than declined, McLouth would doubtless have insisted upon delivery and the most ingenious counsel would be unable to devise an argument excusing petitioner from performance. Indeed the preliminary order of suspension graciously allowed McLouth to accept domestic work and use petitioner's contract. But it is now said, the shoe being on the other foot, that petitioner can receive nothing but "just compensation" excluding profits he would have made, and to arrive at this conclusion it is necessarily contended that the letter ordering McLouth to "notify all subcontractors affected by this cancellation" and the notice given by McLouth to petitioner was a delegated exercise of the power granted by the President by the Act of June 15, 1917, cancelling the very contract in question although petitioner knew not of the existence of the Fleet Corporation contracts. The attorney for respondent goes to great length to demonstrate that the Armistice had no legal significance whatsoever and that the Treaty of Peace, long delayed as to the United States for reasons well known to this Court, and the Presidential Proclamation ended the war. We do not quarrel with the learned counsel but protest against a forced, unnatural, unjust, and inferential construction being

placed upon the facts in this case under the plea and guise of the exigencies of war. The war did as a matter of physical fact terminate with the Armistice.

III. Respondent's Theory of Frustration.

It is contended by respondent's attorney that the contract was frustrated and McLouth excused from performance thereof by the act of the Fleet Corporation in cancelling McLouth's contracts with it, this wholly aside from the claimed cancellation of the instant contract. The doctrine of frustration is well grounded in law and is not disputed by petitioner. It rests upon the theory that in a specific case the parties are deemed to have contracted for the happening of a future event (Coronation Cases), the continuance of life in contracting party (personal service contracts) or the continued existence and/or availability of the subject of the contract (Charter Party Cases). It is elementary and fundamental and the very foundation of the doctrine that both parties must have knowledge of the event to happen, or the thing to be continued in existence. How can this doctrine be said to be applicable to this case? The petitioner had no knowledge whatsoever of the existence of the Fleet Corporation contracts. How can the cancellation of these contracts invoke the doctrine of frustration? All of the frustration cases cited by respondent in the court below may be differentiated from the case at bar. We now point out with respect thereto the thing or event contracted for:

Omnia Commercial Company vs. United States, 261 U. S. 502, (Continuing availability of specific steel plate).

The Frankmere, 262 Fed. 819, (The continued existence or availability of the steamship Frankmere).

Allan Wilde Corporation vs. Vacuum Oil Company, 248 U. S. 377, (Continuance of legal ability of steamer Allan Wilde to make voyage).

International Paper Company vs. The Gracie D. Chambers, 248 U. S. 387, (Same as Allan Wilde).

The Texas Company vs. Hogarth Shipping Company, Ltd., 256 U. S. 619, (Continued existence and availability of ship "Baron Ogilvy").

The Kronprinzessin Cecilie, 244 U. S. 12, (Possibility of peaceful navigation).

The fact that some of these contracts, if not all of them, were frustrated by the act of the Sovereign is no more significant and leads to no different result than if, for example, the steamer Frankmere had been destroyed by fire or other casualty before the time set for the commencement of the charter.

That the existence of a principal contract with the Government giving the Government the right to suspend is not such a fact or circumstance that the suspension of the principal contract frustrates even a subcontract is clearly held by this Court in the case of Guerini Stone Company vs. P. G. Carlin Construction Company, 240 U. S. 264, so that even if the petitioner had known of the existence of the Fleet Corporation contracts and had been admittedly a subcontractor, the doctrine of frustration would be inapplicable, a fortiori when one of the contracting parties

is in ignorance of the very existence of the principal contract.

IV. Act of June 15, 1917, (40 Stat. 182).

We now come to discuss the effect of the above act of Congress, the relevant parts of which are set forth in the margin hereof (1):

(1) "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and their equipment necessary to operation.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order."

It is the claim of the respondent that the order from the Fleet Corporation to McLouth to notify all sub-

contractors affected by this cancellation (Ex. 10, R. 55) and McLouth's telegram to petitioner advising of cancellation (R. 47) constituted a proper exercise by delegation of the power vested in the President by the act of Congress in question. The case of Todd Dry Dock & Construction Corporation vs. Sumner Iron Works, 289 Fed. 217, (Certiorari denied, 263 U. S. 700) is relied upon as supporting that contention. An examination of the record filed in the United States Supreme Court in this case upon the petition for certiorari indicates the following facts which decisively distinguish that case from the case at bar.

"(1) The first order from the Todd Construction Co. to the Sumner Iron Works was dated June 5th, 1918.

(2) This order contained the following paragraph:

> 'Please enter our order for the following list of Winches our vessels No. 8 to No. 17 Emergency Fleet Contract No. 85.'

(3) This order and subsequent orders were acknowledged by the Sumner Iron Works as follows:

> 'We hereby formally acknowledge receipt of your orders for deck machinery as follows: No. 8 to No. 17, inclusive, Emergency Fleet Corporation Contract No. 85.
>
> 'Order No. 29, dated August 17, 1918, Winches for vessels No. 18 to 31, inclusive, Emergency Fleet direct contract S. C. 433.
>
> 'Order No. 192, dated August 29th, 1918. Steering Gear for vessels 8 to 31 inclusive, Emergency Fleet direct contract S. C. 433.'

"The Sumner Iron Works accepts these orders under the following terms and conditions: * * *

'Seventh: It is understood that the deck machinery covered by the above orders, is to be used in connection with the construction of vessels which the Todd Dry Dock & Construction Corporation have contracted to build and construct for the United States Shipping Board Emergency Fleet Corporation, and that the Sumner Iron Works will be furnished in connection with the orders mentioned, with a Class A-5 Priority or better.'

"(4) In the answer filed by the Todd Dry Dock & Construction Corporation to the complaint of the Sumner Iron Works, appears the following:

III.

'That during all of said times defendant was the agent of said Fleet Corporation and the United States Government for the construction of certain steel vessels at defendant's shipbuilding plant in Tacoma, Washington, which fact was at all times well known to said plaintiff, and that the winches, machinery and material referred to in the complaint herein was ordered for use upon said vessels, and not otherwise, which plaintiff well knew.'

IV.

'That all writings signed or delivered by defendant to plaintiff, and all things said or done by defendant, in connection with the matters alleged or mentioned or referred to in the complaint or this amended answer herein, were sign-

ed, delivered, said or done by defendant solely as the agent of said Fleet Corporation and the United States Government, and for and in connection with such vessels so to be constructed by defendant for said Fleet Corporation and the United States Government, and not otherwise; all of which was at all times well known to plaintiff.'

"(5) Upon the trial of this case the parties thereto entered into a stipulation as to facts which provided in part as follows:

III.

'The contract between the parties hereto for the construction by plaintiff of a number of winches was made for the purpose of outfitting the said twenty-four (24) steel steamships with deck machinery. Plaintiff at the time of entering into said contract for the construction of said winches, knew that said winches were to be used as deck machinery for the outfitting of said twenty-four (24) steel steamships and knew that said twenty-four (24) steel steamships were under construction by the defendant for the United States represented by said Fleet Corporation.'

"(6) And lastly, in giving its decision of this case the Circuit Court of Appeals in the course of its opinion, says:

'It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor and the disappointment of profits from its contract which it was preparing to realize and would have

> realized. But it took that chance and has not a legal claim against the government for reimbursement of its outlays. * * * There was no prophecy of the Armistice; its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.' (289 Fed. 220.)"

It is submitted that the facts in the case of American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, (Seventh Circuit) (Certiorari denied, 263 U. S. 709) are more applicable to the facts in this case than were the facts in the Todd Case, supra. Here the contract involved 4,800 tons of round iron bars of from one to three inches in diameter. The contract was signed October 24, 1918, and after 3,200 tons had been taken the buyer repudiated its obligation to take and pay for the remaining 1,600 tons, the defense being that on February 16, 1918, the Emergeny Fleet Corporation had engaged the buyer to furnish 140 anchor chains to be used on troop ships and that the contract with the plaintiff seller had been made for the purpose of getting material from which to make the said chains, as the seller well knew, and that the United States through its proper agent had in March, 1919, cancelled the contract. The Circuit Court of Appeals says, on page 1008:

> "If seller's knowledge that buyer had a contract with the government for anchor chains and would use round iron bars in making the anchor chains was a justification of buyer's repudiation, then similarly seller's unconditioned contract with the furnace company for pig iron could be

> repudiated, and the furnace company's unconditioned contract with the mining company for ore could be repudiated, and so on back to the ultimate of rawness in all materials."

It is to be borne in mind that the subject-matter of the contract in the instant case was lumber, a standard commodity, 115,000 feet of which the plaintiff was engaged in manufacturing at the time of the attempted cancellation and which was remanufactured into sizes and dimensions suitable for sale in plaintiff's regular trade and was sold in the ordinary course of its business (R. 48).

To come even inferentially within the scope of the proposed cancellation, it is necessary to assume that the contract in question was a sub-contract. In 37 Cyc. 340 a sub-contractor is defined as follows:

> "An under contractor—one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract; one who contracts for the principal contractor."

Petitoner's contract was an independent contract with McLouth and it cannot be placed in the status of a sub-contractor without its knowledge and consent. Had McLouth accepted the permission given him by the Fleet Corporation to solicit domestic work for private account for tonnage equivalent to that called for by the Fleet Corporation contracts, could petitioner have claimed it was relieved from its contract either on the theory of frustration or that its contract was cancelled through the cancellation of the Fleet Cor-

poration contracts? There is an inherent inequity in placing McLouth in the profitable position to himself decide whether or not he should compel the petitioner to furnish the lumber for the contract price or whether he should cancel it without any liability to himself.

We now come to a discussion of the decision of this Court in the case of Russell Motor Car Company vs. United States, 261 U. S. 514, in which Mr. Justice Sutherland laid down the doctrine that just compensation provided for by the act of Congress in question does not include anticipated profit. It is said on page 523,

> "In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed. It is evident that no prudent person, desiring to acquire this contract, would have paid for it the full amount which could be realized upon completion, leaving no chance of return to himself upon the investment or for the risk and labor incident to its performance. The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties."

It is to be noted that the Russell Motor Car Company Case involved a contract for certain war material directly with the United States, the power of cancellation resting in one of the parties to the contract. This

could be said to be within the contemplation of the parties. In the instant case the contract was a private contract between two individuals not tied up in any manner as a subcontract to a contract with the Sovereign and, while it may be conceded for the purpose of argument that it was within the power of the Sovereign to requisition or cancel the contract, a taking of the contract without including in just compensation the amount which the contract was reasonably worth is certainly not within the decision in the Russell Motor Car Company Case and is wholly at variance with the decisions of this Court.

In the case of Monongahela Navigation Company vs. United States, 148 U. S. 312, in which the Court says on page 326,

> "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

The Monongahela Case involved the condemnation of a lock and dam and it was held that compensation included the value of the franchise to exact tolls as well as the value of the tangible property taken and the Court says on page 329, "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls."

To the same effect is the case of Seaboard Air Line Railway Company et al. vs. United States, 261 U. S. 299, holding as did the Monongahela case that the ascertainment of just compensation is a judicial function and that the compensation to which the owner is entitled is the full and perfect equivalent of the property taken, including in that particular case interest at a proper rate upon the award.

See also Richards vs. Terminal Company, 233 U. S. 546; Capital Trust Company vs. Calhoun, 250 U. S. 308.

It is, therefore, submitted that the decision of the District Judge and of the Circuit Court of Appeals in the case at bar are in error and that the same should be remanded with instructions to enter judgment for the petitioner for the full amount claimed.

Respectfully submitted,

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